No. 3180

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

CHIN FONG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

APPELLEE'S REPLY BRIEF

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POINTS AND AUTHORITY.

Appellant's claim is based upon the ground "that he is returning to a previously established mercantile domicile in the United States" (App. Opening Brief, pg. 1). This necessarily carries with it the claim that he has heretofore *lawfully* established a domicile in the United States to which he has a *lawful* right to return. That is the issue, and from the very statement of

the issue, it is clear that the scope of inquiry is not limited to the period of one year prior to his departure, as contended for by appellant's counsel. If the inquiry was thus limited, it follows that entry into the United States, however unlawful, even by a Chinese laborer, which is unquestionably unlawful, followed by his engaging in the mercantile business for one year or more, would give him the status of a merchant, and, being thus limited, he could never be deported for there is no authority anywhere for the deportation of a *lawfully* domiciled merchant, and it would also result in creating a statute of limitations, to-wit, deportation proceedings would have to be commenced within one year after such unlawful entry when the Chinese immediately engaged in a mercantile business, and in any event, prior to his having been engaged in said business for one year, while in fact, there is no limitation applying to an *unlawful* entry under the Chinese Exclusion and Restriction Acts. Again, the power to create a limitation is vested in the legislative and not the judicial branch of the Government. Pursuing the matter further, it is plain that if such a rule were adopted, limiting the evidence to one year prior to the departure of the Chinese before the executive branch of the Government, then if the procedure were had before the judicial branch of the Government under Section 13 of the Act of Sep-

tember 13, 1888, (as counsel contends) the rule would also apply, and the obvious result would be, that however unlawful the entry, one year or more of merchandising would be a complete protection against deportation however attempted, and the objects and purposes of the law would be frustrated and too by the commission, on the part of the Chinese, of an unlawful act.

In re-entry cases, the first inquiry naturally and logically is, when, where, how and under what provision of the Chinese Exclusion Laws did you previously enter the United States. These matters are clearly pertinent to the inquiry in re-entry cases. Reentry cases are specifically committed to the jurisdiction of the Immigration Department and it has frequently been held by the Courts, that one applying for entry or re-entry, and his right of entry or reentry is subjected to investigation and he is temporarily landed pending investigation, he is not, in contemplation of law, *within the United States,* even though he is physically therein. The Act itself provides "Such temporary removal shall not be considered a landing."

The same doctrine was enunciated by the United States Supreme Court in the case of the *U. S. vs. Ju Toy,* 198 U. S. 253-263, as follows:

> "The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial. That is the result of the cases which we have cited, and the almost necessary result of the power of Congress to pass exclusion laws."

The proceeding for deportation through the judicial branch of the Government, referred to by counsel for appellant, in his opening brief, deals *solely* with Chinese *already within the United States.* To state it perhaps more clearly, where a Chinese has unlawfully *entered* the United States and is thereafter *found therein,* then the deportation proceedings fall within Section 13 of the Act of September 13, 1888. The distinction is plain, the jurisdiction equally so. That portion of Section 13 of said Act relied on by appellant's counsel reads: "That any Chinese person or person of Chinese descent, *found unlawfully in the United States,"* etc. In order to sustain counsel's contention there would have to be read into that section the words *"and all persons who apply for re-entry,"* etc., this the Government contends may not be done without doing violence to the

Act as well as to the well established rules of statutory construction.

Again, as bearing upon the question, and embodying the same principle, we cite the case of *Chu Chee,* 93 Fed. 797-804, where this Court speaking through Honorable W. W. Morrow, laid down the rule, to-wit,

> "A Chinese person, who obtains entry into the United States *without the certificate from the Chinese Government showing him to be a member of the class privileged to enter,* which is required by the Acts of Congress, cannot establish his right to remain, when arrested under the Act of May 5, 1892, as a Chinese laborer within the United States without the certificate of residence required by law, *by proof that since his entry he has not been a laborer, but has followed the occupation of a member of the privileged class.*
>
> But it is contended on the part of the defendants that the status of Chinese aliens domiciled in the United States must be determined according to *their status at the time of arrest,* and *not at the time of entry,* and that, upon being arrested, it was competent for them to show by affirmative proof that they were students engaged in acquiring an education in our schools, and being so engaged, they were not members of the prohibited class, and not subject to deportation.
>
> When, however, that domicile has been acquired *contrary to and in violation of the laws of the United States,* and when, as here, it is only through an *unlawful entry into the United States* that the Chinese persons secure a residence in this country, *they cannot purge themselves of their offense* by assuming the occupation of mem-

> bers of the privileged class, and establish their right to remain by proof of that character. The right of the defendant to land in this country on the claim of being students was dependent upon their producing to the collector of customs, at the port of their arrival, the certificate required by Section 6 of the Act of 1882, as amended; and to entitle them to remain here *they must thereafter produce the same to the proper authorities whenever lawfully demanded.*"

In the case of *Mar Bing Guey vs. United States,* 97 Fed. 576-580, the Court following the rule laid down in the *Chu Che* case, supra, says:

> "It is conceded by counsel that the appellant did not procure the certificate required by the Act of Congress prior to his departure from China, nor did he attempt to comply, in any respect, with the provisions of the Act. *Under the law the certificate was the sole evidence* permissible to establish his right of entry. His entry, therefore, was unlawful, *and his residence here is equally so;* and it is made the imperative duty of the justice, judge or commissioner, to cause a Chinese person to be deported "if found to be one not lawfully entitled to be or remain in the United States." The statutes above referred to effectually dispose of this case, and the ruling here announced finds abundant authority in its support. *Wan Shing v. U. S.,* 140 U. S. 424, 11 Sup. Ct. 729; *U. S. v. Chu Chee,* 35 C. C. A. 613, 93 Fed. 797; *In re Li Foon* (C. C.) 80 Fed. 881; *In re Wo Tai Li* (D. C.) 48 Fed. 668."

The Court in *Ex parte Mac Fock,* 207 Fed. 696-698, says:

"Estoppel cannot operate as against the Government, nor do the facts show abuse of discretion. Upon the conceded facts with relation to this certificate, it being all the proof that was presented, the Department of Immigration cannot be criticized for further examination with relation to the nativity of the petitioner. The examination as disclosed by the record seems to have been fair and impartial and no undue advantage taken of the petitioner. The examination disclosed that the petitioner was born in China; that he arrived in Vancouver and entered the United States at Richford, Vt.; that the certificate was there given to him; that it was fraudulently issued or obtained through perjury. The petitioner, if not an actual participant, was the beneficiary and knew of the wrongful practices.

Being in the United States unlawfully and the beneficiary of the certificate unlawfully issued, and having lived in the United States for seventeen years, and knowing of the fraud or perjury practiced upon the issuance of the certificate, and the fraudulent practices continued by him upon the Immigration Commissioner when he obtained an expression of regularity of such certificate, the petitioner upon the record before the Court cannot complain. No lapse of time would ripen such a wrong into a right *nor afford a basis upon which to predicate abuse of discretion.* The Department of Immigration did not abuse its discretion. *De Bruler v. Gallo,* 184 Fed. 566, 106, C. C. A. 546; *Chin Yow v. United States,* 208 U. S. 8, 28, Sup. Ct. 201, 52 L. Ed. 369; *Ex parte Lung Wing Wun* (D. C.) 161 Fed. 211; *United States v. Sing Tuck,* 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917.

> The motion is granted, the writ discharged, and the petitioner remanded to the custody of the Commissioner of Immigration.

The doctrine announced in the case of *Ekiu v. United States* found in the 142 U. S. 651; 35 L. Ed. 1149, is as follows:

> "It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, *nor even been admitted into the country pursuant to law*, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the National Government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."

Counsel for appellant in his opening brief, suggests five exceptions in this case, but finally groups them. As we view the situation, under the decisions, there can be but two questions subject to review by and consideration of the Court on Habeas Corpus.

1st. Has the applicant had a fair hearing?

2nd. Have the executive officers abused the discretion committed to them?

What constitutes a fair hearing is reasonably well established, but occasionally we find a new theory advanced and considered under the first of said ques-

tions and the already rather large field is made more comprehensive, but no claim is made by appellant that the hearing herein had was unfair, and thus the sole question here is the one of discretion.

Discretion could not arise in a case where the evidence is all in favor of the right of entry, or all against it. This condition seldom arises. If there is a substantial conflict in the evidence bearing upon the issue, then, as we believe, a discretion arises, and it is an abuse of this discretion that creates the second question that may be presented to the Court on Habeas Corpus.

We give a brief statement of the evidence and facts with the hope that it may aid the Court in its review, and cite the law we believe applicable thereto.

Chin Fong, on December 11, 1911, made formal application to the Chinese Inspector in Charge at New York, N. Y., for pre-investigation of his claimed status as a lawfully domiciled merchant and member of the firm of Kwong Mow Lan & Co., No. 8 Pell Street, New York City, stating his intention to depart and return through the Port of Seattle, Wash. The testimony of Chin Fong, Chin Yung, manager of said firm, John Delmonte, Robert Brand and Israel B. Brand was taken as required by rule 15 of the Chinese Rules and Regulations, by the Immigra-

tion officials at New York, and forwarded to the Commissioner of Immigration at Seattle, Wash., the port of departure, for his approval or disapproval as the facts should warrant. Said application for a merchant's return certificate was denied by the Commissioner of Immigration at Seattle, Wash., January 26, 1912, as follows: "I beg to state that from the evidence presented, I am not satisfied that this applicant is entitled to the endorsement he seeks. If he were admitted in 1897 as stated, it is quite likely that he has or did have an identification paper showing such admission. That paper should now be produced or its loss accounted for. If admitted as stated, the applicant should be able to give sufficient information about his admission to enable this service to verify the same. As the record now stands, it appears that Chin Fong is *not lawfully* within the United States, and it is for this reason that I have denied the application."

An appeal was taken from this decision to the Commissioner General of Immigration, who, on February 21, 1912, affirmed the same as follows: "After carefully considering the evidence presented in the record, I am of the opinion that Chin Fong has failed to establish his right to a merchant's return certificate. Your decision is therefore affirmed."

Notwithstanding the denial of a merchant's return

certificate, the said Chin Fong left the United States for China through the Port of San Francisco on the S. S. "Nile," November 23, 1912, at which time he presented to the Immigration Inspector, whose duty it was to check out Chinese departing on said vessel, affidavits of himself and two white witnesses as to his mercantile status, which said affidavits were endorsed by said Immigrant Inspector for identification purposes only. Chin Fong returned to the United States through the Port of San Francisco on the S. S. "Persia," December 23, 1913, presented said affidavit and applied for admission, claiming to be a lawfully domiciled Chinese merchant, returning from a temporary visit to China. His application to reenter the United States was denied by the Commissioner of Immigration at San Francisco, February 6, 1914, on the grounds that his former entry into the United States was unlawful. An appeal from this decision was taken to the Secretary of Labor, who approved the decision of the said Commissioner of Immigration that admission be denied. The finding of the Acting Secretary was as follows:

> "I am satisfied that the action recommended by the Bureau is the correct one in this case. The original entry of this man was obtained by fraud. He cannot predicate any right whatever upon the basis of fraud. The fact that he has been permitted to remain in this country constitutes no waiver of the right to deport him, and

> the fact that the Government has not heretofore affirmatively exercised the authority to deport him, while it amounts to tentative permission to remain here, does not preclude or estop the Government fro mexercising its authority to deport or deny admission at any time. A different question would be presented were the facts such that it did not appear that the alien's original entry was fraudulent. No business he might engage in nor length of residence here, can cure the fraud perpetrated by him in gaining admission in the first instance. This case appears to be quite fairly within the Mack Fock decision, which in my opinion, is correct. The recommendation that admission be denied is approved."

The matter was thereafter, to-wit, March 19, 1914, brought before the District Court on Habeas Corpus proceedings in case No. 15614. Judge Dooling in denying the Writ rendered the following opinion: (213 Fed. 288).

> "The petition shows that petitioner, Chin Fong, who had been a resident of the United States for a number of years, departed for China in November, 1912; that before he left he applied for a preinvestigation as to his status as a merchant, and a certificate was denied him, on the ground that his original entry into this country was surreptitious; that, notwithstanding this denial, the petitioner left the country, and is now endeavoring to re-enter as a returning Chinese merchant; that he presents the affidavits of a member of the New York firm to which he claims to belong and of two reputable Americans supporting his

claim; that, notwithstanding these facts, he has been denied admission and ordered deported on the same ground that his preinvestigation certificate was denied, that is to say, because his original entry was surreptitious; that in so deciding the immigration department has exceeded its authority, as that question can only be determined under the exclusion laws by a justice, judge or commissioner.

This, briefly stated, is the body of the present petition for a writ of habeas corpus. To this petition a demurrer has been interposed. I am of the opinion that the demurrer must be sustained.

Had the petitioner been content to remain in this country, he could have been deported only after a hearing before a justice, judge, or commissioner. But as he left the country voluntarily, and even after a preinvestigation certificate was denied him, the question of his right to re-entry lies peculiarly with the immigration department, and as they have found that he is not entitled to re-enter, such finding cannot be disturbed. A different rule prevails, and a different tribunal determines, in the case of a Chinese applying to enter from that of one already in this country, whom it is sought to deport, under the exclusion laws.

The demurrer will therefore be sustained, and the application for a writ denied."

An appeal from this decision was taken to the Supreme Court of the United States on the mistaken theory that the construction of a Treaty was involved. This appeal was thereafter dismissed for want of jurisdiction (241 U. S. 1). On May 25, 1917, a new

petition for writ of habeas, No. 16205, was filed and order to show cause issued. Respondent made return to the order to show cause and the matter was heard before Judge Dooling, June 7, 1917. In denying said petition for writ of Habeas Corpus, the Court said:

> "This matter came on regularly this day for hearing on the order to show cause as to the issuance of a writ of Habeas Corpus herein. C. A. Ornbaum, Esq., Assistant United States Attorney, was present for and on behalf of respondent, and filed a return to said petition.
>
> George A. McGowan, Esq., was present as Attorney for and on behalf of petitioner and detained. On his motion, the Court ordered that petitioner be, and he is hereby allowed to hereafter file a traverse to said return *nunc pro tunc* as of today, June 7, 1917. Said matter was thereupon argued by said attorneys and submitted. After due consideration had thereon, it is further ordered that said petition for a Writ of Habeas Corpus, be, and the same is hereby denied, and that the order to show cause be discharged accordingly."

It will be noted that counsel for petitioner and detained failed to traverse said return.

It is from this decision denying the Writ that this appeal is taken. Chin Fong, as an applicant for a merchant's return certificate, testified under oath before the Immigrant Inspector in New York City, January 3, 1912, as follows:

Q. What is your name?

A. Chin Fong.

Q. Have you any other name?

A. *No.*

Q. How old are you?

A. 33.

Q. Where were you born?

A. Ham Yee village, Sunning District, China.

Q. When did you first come to the United States?

A. *K. S. 22, 11th month* (December, *1896*-January, 1897.)

Q. How old were you at that time?

A. 18.

Q. Do you know the name of the place where you were admitted?

A. The port of entry is called Niagara Falls by the Chinese, it is near Niagara Falls. I don't know what you call it, but I was admitted at that Port.

Q. What kind of papers did you present?

A. Merchant's paper.

Q. That was the first time you had ever been in the United States?

A. Yes.

Q. Where did you get those papers?

A. Merchant of Young Wah Hong, 33 Mott Street, New York City.

Q. *Did they send the paper from New York to China?*

A. *Yes.*

Q. Did you come direct from the Port of entry to New York?

A. Yes.

Q. How long did it take you?

A. I took the train about noon at that place and reached New York in the evening.

Q. Have you been back to China since you first came to the United States?

A. No.

Testimony of Chin Fong at Angel Island, San Francisco, Cal., December 29, 1913:

Q. What are your names?

A. Chin Fong, *Chin Ai Chee,* no others.

Q. How old are you?

A. 34.

Q. Where were you born?

A. Hong Mee village, S. N. D.

Q. When did you first come to the United States?

A. *K. S. 32 (1906).* Sailed from China in the second month via S. S. "Empress of India." I do not know the date of arrival at Vancouver. I went to New York by way of Montreal as a *Section 6 Canton merchant,* under the name of Chin Fong.

Q. Where did you enter the United States?

A. I was examined at Niagara Falls by Immigration officers.

Q. What was that date?

A. About the *fourth month* of that year. I don't remember the date.

Q. Where is your Section 6 Certificate?

A. I kept that paper in the Yung Wah Tong Co., in which firm I have an interest. They were moving in the fifth or sixth month of S. T. 1, (1909) and it was lost during the time when they were moving.

Q. From what to what address were they moving?

A. From 32 Mott Street to 33 Pell Street.

Q. Immediately after your arrival in the United States, K. S. 32-4 (1906), what did you do?

A. I joined the Yung Wah Tong Chinese Drug Store, 32 Mott St., about the fifth month of that year in the position of salesman and prescription clerk.

Q. How long did you remain in that firm?

A. A little over *three years.*

Q. Until when?

A. Until K. S. *36*-8 (*1910*).

Q. Was there such a thing as Kwong Suey 36?

A. I don't remember how many years there were in the Kwong Suey reign. I stayed in the firm of Yung Wah Tong about *six years.*

Q. At what address was that store?

A. Three years on the Mott St. number, then they moved to 33 Pell St. for a little over three years and the firm went out of business.

Q. After the firm went out of business, what did you do?

A. Then I was employed at Quong Hai Chung Co., 32 Pell St. as a salesman and prescription clerk for about three years.

Q. Do we understand you to say that you arrived in the United States, K. S. 32-5 (1906), and were a member of the Yung Wah Tong for *six years* and employed in the Quong Hai Chung for *three years* before you departed for China?

A. No. I was a member of that cigar factory for another *three years.*

Q. What cigar factory?

A. Quong Mow Long Co., No. 8 Pell St.

Q. When did you join that firm?

A. K. S. *35* (*1909*).

Q. Did you enter that firm in K. S. 35?

A. Yes.

Q. As an active member?

A. No. I merely purchased an interest.

Q. When did you become an active member in that firm?

A. I was an active member of that firm during the three years prior to my departure for China.

Q. From what date?

A. S. T. 2 (1910).

Q. How many years of Quong Suey were there before the reign of Sin Tung?

A. *I don't know.*

Q. How many years after K. S. 36 was S. T. 2?

A. *I don't remember.*

Q. Do we understand you to say that you were *six years* with the Yung Wah Tong, *three years* with the Quong Hai Chung and an active member of Quong Mow Long Co. for *three years* prior to your departure for China. Is that correct?

A. Yes.

Q. That is an impossibility. *Seven years* only have passed and you have accounted for twelve.

A. *I might have made a mistake about the time I worked for Quong Hai Chung. I don't know how many years I really worked there.*

Q. Should you not remember how long you worked in Quong Hai Chung?

A. I don't remember.

Q. What, don't you remember if you worked there every day?

A. One or two years.

Q. *Have you any other explanation to offer?*

A. *No.*

At the time this last quoted testimony was given, the Immigration officers at San Francisco had no knowledge that Chin Fong had heretofore made application for a merchant's return certificate in 1912, which had been denied. The record was forwarded to the New York office for further investigation of his claimed mercantile status, and it was only after that

office made its report that the San Francisco office knew of the testimony given by Chin Fong in New York on January 3, 1912. It was then that the conflicting testimony concerning his original entry into the United States was first discovered.

TESTIMONY OF JANUARY 3, 1912.

Q. When did you first come to the United States?

A. K. S. *22, 11th month* (December, 1896-January, 1887).

Q. How old were you at that time?

A. 18.

Q. Do you know the name of the place where you were admitted?

A. The port of entry is called Niagara Falls by the Chinese. It is near Niagara Falls. I don't know what you call it but I was admitted at that port.

Q. What kind of papers did you present?

A. Merchant's paper.

Q. That was the first time you had ever been in the United States?

A. Yes.

TESTIMONY OF DECEMBER 29, 1913.

Q. When did you first come to the United States?

A. K. S. 32 (1906). Sailed from China in the second month via S. S. "Empress of India". I do not know the date of arrival at Vancouver. I went to New York by way of Montreal *as a Section 6 Canton merchant,* under the name of Chin Fong.

Q. Where did you enter the United States?

A. I was examined at Niagara Falls by Immigration Officers.

Q. What was that date?

A. About the *fourth* month of that year—I don't remember the date.

Q. Where is your Section 6 certificate?

Q. Where did you get those papers?

A. Merchant of Young Wah Hong, 33 Mott St., New York City.

Q. *Did they send the paper from New York to China?*

A. *Yes.*

A. I kept that paper in the Young Wah Tong Co. in which firm I have an interest. They were moving in the fifth or sixth month of S. T. 1 (1909) and it was lost during the time when they were moving.

Q. From what to what address were they moving?

A. From 32 Mott St. to 33 Pell St.

Q. Immediately after your arrival in the U. S. in *K. S. 32-4 (1906)*, what did you do?

A. I joined the Yung Wah Tong Chinese drug store, 32 Mott St., about the fifth month of that year in the position of salesman and prescription clerk.

Q. Do we understand you to say that you arrived in the U. S. *K. S. 32-5 (1906)*, and were a member of the Yung Wah Tong for *six* years and employed in the Quong Hai Chung for *three* years before you departed for China?

A. No. I was a member of that cigar factory for another *three* years.

Q. Do we understand you to say that you were *six* years with the Yung Wah Tong, *three* years with the Quong Hai Chung, and an active member of Quong Mow Long Co. for *three* years prior to your departure for China. Is that correct?

A. Yes.

Q. That is an impossibility. Seven years only have passed and you have accounted for *twelve*.

A. I might have made a mistake about the time I worked for Quong Hai Chung. I do not know how many years I really worked for them.

Q. *Have you any other explanation to offer?*

A. No.

Here we find serious discrepancies in testimony given by Chin Fong about 22 months apart. On January 3, 1912, he testified that he first came to the United

States in *K. S. 22, the 11th month*, on paper sent to him in China *from New York*. On December 29th, 1913, he testified that he arrived in Vancouver, B. C., *K. S. 32 (1906)*, and entered the United States on the *fourth month* of that year on a Section 6 Certificate which he claims to have lost in 1909 when the firm with which he was connected was moving. The Inspector in charge at New York reports that no such move took place. Chin Fong names three firms with which he was connected from his arrival in K. S. 32 (1906) to 1912, the date of his departure. The time he claims to have been connected with these firms amounts to twelve years, while less than seven years have intervened between those date, and he fails to make any satisfactory explanation of the discrepancy

Chin Fong was again examined at San Francisco, January 24, 1914, at which time the Immigration officials had before them his testimony given in New York, January 3, 1912. His testimony is in part as follows:

Q. Are you the person who testified in this office December 29, 1913.
A. Yes.

Q. Do you wish to make any alterations or corrections in that statement?
A. *No.*

Q. You are absolutely positive that you do not care to make any alterations?
A. *Yes. I am sure.*

Q. How many trips have you made to China?
A. Only this trip.

Q. Have you at any time ever appeared before the Immigration Officers and testified?
A. Yes. I have testified in the New York office.

Q. When?
A. C. R. 1-10 (Nov. or Dec., 1912).
Q. In what case?
A. In my own case.
Q. What case was that? What was your own case at that time?

A. Applied for Form 431 (Merchant's return certificate).

Q. Did you get it?
A. No. *I received a letter stating I was acknowledged as a merchant by the office but to defer my trip until a further date.*

Q. Are you sure you are telling us the truth?
A. Yes.

Q. Do you wish to make any possible excuse or equivocation at all?
A. I do not.

Q. (Showing photo on Form 431, Dec. ....., 1911, N. Y. No. 2495-444, Seattle No. 28913.) Whose photograph is that?
A. That is myself.

Q. The record shows that under date of February 26, 1912, File No. 28913, that the Certificate you sought could not be granted. Why do you testify as you do?
A. I was told by the Chinese who represented me in my case that the office had acknowledged my mercantile status and that I could make the trip and so I made it.

Q. But your understanding seems to be an impossibility for the reason that the letter above mentioned is addressed to Chin Fong, care Kwong Mow Lan Co., 8 Pell St., New York City.

That shows that the letter written to you by the Commissioner at Seattle was addressed to you personally, and that in accordance with the Postal Laws and Regulations, that communication could only have been delivered to yourself.

A. I never received such communication while I was in New York.

Q. Do you expect this office, if you are a resident of New York City as you claim in your testimony of December 29th in this office, do you expect us to accept such a statement as that, that you did not receive a communication addressed to you in a Government envelope?

A. The interpreter I have employed representing me might have kept the communication himself and not have let me have it. I don't know how to read or write myself in English.

Q. You were represented by an attorney, Mr. Storey?

A. Yes. He told the interpreter that was representing me that the decision in Washington said that I could go to China and that I was acknowledged as a merchant.

To show that this testimony is a fabrication and untrue, we quote the correspondence passing between Chin Fong, his attorney Mr. Storey, and the Commissioner of Immigration at Seattle, Wash., when his application for a merchant's return certificate was denied.

New York, N. Y., January 25, 1912.

Mr. H. R. Sisson,
Chinese Inspector in Charge,
New York, N. Y.

Sir:

Referring to your letter of January 23, File 2495-444, in the case of Chin Fong, I beg to advise that the appeal filed by me in this case is herewith withdrawn.

Respectfully,
(Signed) James V. Storey.

Seattle, Washington,
January 31, 1912.

No. 28,913.

Inspector in Charge,
U. S. Immigration Service,
17 State St., New York, N. Y.

Sir:

Receipt is acknowledged of your letter of January 26, 1912, No. 2495/444, with which you inclosed letter from James V. Storey withdrawing his appeal from my decision in the Chin Fong departing merchant case.

Respectfully,
(Signed) Ellis De Bruler,
Commissioner.

New York City,
January 27, 1912.

To the Chinese Inspector in Charge,
Port of Seattle, Wash.

Dear Sir:

You will please take notice that I hereby appeal to the Department of Commerce and Labor, Washington, D. C., from your decision denying me the right to re-enter the U. S. as a resident, Merchant at No. 9 Pell Street, N. Y. and I de-

sire that a copy of the record in my case be forwarded to Washington at once.

Yours truly,

(Signed) Chin Fong,
Apperciate.

Seattle, Washington,
February 2, 1912.

No. 28,913.

Chin Fong,
c/o Kwong Mow Lan Company,
No. 8 Pell St., New York, N. Y.

Sir:

I am in receipt of your letter of January 27, 1912, giving notice of appeal from my decision denying you an indorsement as a domiciled merchant. It is suggested that you call on your attorney, Mr. James V. Storey, or on Inspector in Charge Sisson relative to this matter. As Mr. Storey, after reviewing the record in your case, has formally withdrawn the appeal he had filed. Of course, if you desire to reinstate your appeal you have the privilege of doing so. The matter will be held in abeyance pending the receipt of further advice from you.

Respectfully,

(Signed) Ellis De Bruler,
Commissioner.

New York City, N. Y.
February 7, 1912.

U. S. Commissioner of Immigration,
Seattle, Washington.

Dear Sir:

Mr. Storey withdrew from my case at my request, but I desire to have my case reviewed by the Department at Washington. Therefore will

you kindly forward the papers to Washington and notify me.

Yours truly,
(Signed) Chin Fong,
Apperciate.

Seattle, Washington,
February 14, 1912.

No. 28,913.
Chin Fong,
c/o Kwong Mow Lan Company,
No. 8 Pell Street,
New York, N. Y.

Sir:

Your letter of February 7th was received today. It is noted that though your attorney, Mr. Storey, has withdrawn appeal in your case, you desire to have the matter reviewed by the Bureau. In accordance with your request the record will tomorrow be forwarded to the Commissioner-General of Immigration. On receipt of decision you will be notified.

Respectfully,
(Signed) Ellis De Bruler,
Commissioner.

Seattle, Washington,
February 26, 1912.

No. 28,913.
Chin Fong,
Care Kwong Mow Lan Co.,
8 Pell Street,
New York City.

Sir:

Referring to my letter to you of February 14th last, I beg to inform you that I am this day in receipt of a letter from the Bureau, affirming my decision in the matter of your application for pre-investigation of your status as a merchant.

In view of that decision the certificate you seek cannot be granted to you.

Respectfully,

(Signed) Ellis De Bruler,
Commissioner.

Q. Your statements are inconsistent and not in accord with the record. We will therefore rely upon the record rather than upon your statements. You also testified that you were examined in Niagara Falls about the *4th* month of *K. S. 32* (1906). *Is that correct?*

A. *Yes.*

Q. *Do you wish to make any alterations or corrections in any particular?*

A. *No.*

Q. On January 3, 1912, in New York, you testified that you first entered the U. S., K. S. 22-11, at the two statements in the two applications.

A. I said K. S. 22. I did not say K. S. 32 in my last testimony.

Q. Just a moment ago you said that the statement of K. S. 32 was correct. You verified your original testimony *before being confronted with the New York record.*

A. I thought you meant K. S. 22 instead of K. S. 32, when you asked me whether it was correct or not.

Q. Why is it you give a *different month* in the two different records?

A. I really came K. S. 22, arriving in the United States across the border in the *fifth month.* I left China in the fourth month.

Q. How did you cross the border?

A. All the aliens were stopping in Montreal and there were two white men who called our names and we went to Niagara Falls with them.

Q. Didn't you cross the border surreptitiously and not through the regular Government channels?

A. I was examined in a big building in Niagara Falls and after my examination I was taken to the train by the same man who examined me and put on the train to New York.

Q. You claim to have had a Section 6 paper and to have lost it. Is that correct?

A. I do not know exactly what kind of a paper I had. I was young then. I do not know what kind of a paper, but I had a paper.

Q. Where is that paper now?

A. At the time our store moved we lost it.

Q. What store?

A. Yung Wah Tung Co.

Q. When did you lose it? What date?

A. K. S. 34-7 or 8.

Q. Why is it that you do not give the same testimony today as you did on December 29th as to the date? Can't you give the same testimony within a month?

A. *No answer.*

Q. As a matter of fact, according to the report at New York City, no such move ever took place. How do you account for that?

A. It was formerly on Mott Street and then moved to Pell Street. There was such a move.

Q. What number Pell Street?

A. The store is not in existence now.

Q. What was the number at that time?

A. 33.

Q. You are also advised that the firm who now occupies 33 Pell Street has been there for many years last past, which also shows that your statement is incorrect. Why do you make such statements?

A. The store was sold to this Sam Yup man, named Ah Fong. The name of the firm was Fong Kee.

Q. Is Fong Kee at 33 Pell Street now?

A. Yes.

Q. You are advised that this is not a correct statement according to the investigation at New York. Why not tell the truth?

A. There is a Fong Kee.

Q. Do you expect us to believe you in preference to the investigation conducted at New York City by members of the Immigration Service?

A. I did not have to come in illegally at that time. *Yung Wah Tong got my papers for me* in China and the rules of the Exclusion Act at that time were not so severe as it is now, *and it was easy for me to get in at that time.* I did not have to come into this country *at that time illegally.*

Here again we find contradictions as to the date of entry, the kind of papers on which he was admitted, how and where they were procured and when and how they were lost. On January 3, 1912, he testified that he first entered in *K. S. 22, 11th month,* (*December, 1896-January, 1897*). On December 29, 1913,

he fixes the date as *K. S. 32, fifth month (June or July, 1906,)* and on January 24, 1914, when confronted with his testimony of January 3, 1912, he gives an altogether different date, to wit, *K. S. 22, 5th month (June or July, 1896)*.

On January 3, 1912, he testified that he was admitted on merchant's papers sent him in China from New York. On December 29, 1913, that he was admitted as a Section 6 Canton merchant, while on January 24, 1914, he testified: "I do not know exactly what kind of papers I had. I was young then. I do not know what kind of a paper but I had a paper. I did not have to come in illegally at that time. Yung Wah Tong got my papers for me in China."

On December 29, 1913, when asked to produce the papers on which he was first admitted, he testified that they were lost in the *fifth or sixth month of S. T. 1 (1909)*, when the firm with which he was connected was moved from 32 Mott St. to 33 Pell St., while on January 24, 1914, he testified that they were lost *K. S. 34-7 or 8 (Aug. or Sept., 1908)*.

The Inspector in Charge at New York reports that Quan Yuen Shing Co. has occupied the premises at 32 Mott St. for many years last past, as is also the case with the firm of Chong Long & Co., at 33 Pell St. So the move described by Chin Fong, when his

papers are claimed to have been lost, could not have taken place. When advised that the firm who now occupies 33 Pell St. has been there for many years, he testified as follows: "The store was sold to this Sam Yup man, named Ah Fong. The name of the firm was Fong Kee. Q. Is Fong Kee at 33 Pell St. now? A. Yes. Q. You are advised that this is not a correct statement according to the investigation at New York. Why not tell the truth? A. There is a Fong Kee."

Obviously no such move as described by Chin Fong ever took place, and he could not have lost his papers in the manner described by him. The evidence plainly shows that Chin Fong must have known and did know the reason why the merchant's return certificate was denied him in 1912, and that the only thing necessary for him to do in order to get such a return certificate, was to produce documentary evidence of his lawful admission into the United States, or if such evidence was not in his possession, then to furnish the Immigration officers with such information regarding the time and place of his entry as would enable them to verify his claim from their records. No documentary evidence was offered at any of the examinations, nor has its absence been satisfactorily explained.

Chin Fong claims to have been admitted at Niagara Falls, New York, which place, however, was not a port or entry for Chinese at any of the time mentioned by him as the date of his admission, and his entry cannot be verified by the Government records.

Chin Fong knew the reason he was not granted a return certificate, knew that he had not shown to the Immigration authorities that he ever had a section 6 certificate as he claimed. He knew that he had not shown a lawful entry, and this knowledge he acquired a year or more prior to his departure. He was in China thereafter for a year or more and at the very place where he claims he secured his certificate, and thus was afforded an opportunity, and all the circumstances rendered it not only possible but required him to procure and upon his return produce the evidence of his having had issued to him by his Government in China, either in 1896 or 1897 or 1906, a Section 6 Certificate, but he returns without any evidence whatever respecting this vital point. The conclusion is too plain to require comment. If he had "a pitiable inadequate conception of our modes and methods of procedure relative to the laws and regulations with respect to Chinese persons" in 1896 or 1906, whenever it was he first came here, as counsel very feelingly pleads, his long residence here and his

effort to secure a return certificate which was denied, was certainly sufficient to remove that pitiable and inadequate conception, and bring rather clearly, if not forcibly, to his mind that the Chinese Exclusion and Restriction Acts were not enacted for an idle purpose nor to be ignored at will by those who found it possible or convenient to do so.

It is a quite well known fact, established by the record of Chinese who come to the United States, with or without right of entry, that they are not ignorant of either the rules and regulations nor of the law respecting their right of entry, and they are by no means in the condition or class counsel seeks to place them, and appellant affords no exception. This fact is clearly demonstrated by his own testimony in reference to the law at the time of his first entry as well as any changes therein since, to-wit: "I did not have to come illegally *at that time.* * * * *The rules of the Exclusion Act at that time* were not so severe *as it is now*, and it was easy for me to get in at that time. I did not have to come to this country at that time illegally." There is also nothing in the record that lends support to counsel's further statement in mitigation of the many conflicting statements in appellant's testimony in, that the *details* of his entry "have quite substantially faded from his mind". It is not lack of *detail* that we are

dealing with, but the vital things shown by the record that attracts the attention of the Government and which are so apparent they cannot be minimized by calling them details. Appellant's statements cannot be harmonized nor are they the result of a "faded memory," but they fall clearly within and are a perfect exemplification of the truism, "Oh, what a tangled web we weave when first we practice to deceive."

The record clearly discloses such substantial conflict in the evidence on material matter which of necessity called for the exercise of judgment and discretion on the part of the executive officers and this discretion has been exercised. Where power is vested in Appellate Courts to review an exercised discretion, there must appear a *clear* abuse of discretion before it will be disturbed. The above and kindred doctrine has heretofore been so frequently announced that citation of authority is hardly necessary, however, we cite a few cases.

In *Bates & Guild v. Payne,* 194 U. S. 106; 48 L. Ed. 894, the Court says:

> "Where Congress has committed to the head of a Department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involves questions of law or fact, will not be reviewed by the Courts, unless he has exceeded his authority or this Court

should be of opinion that his action was *clearly* wrong."

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion to the head of a Department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it *a strong presumption* of its correctness, and the Courts will not ordinarily review it, although they may have the power and will occasionally exercise the right of so doing."

In 216 U. S. 251, 262; 54 Law Ed. 469-472, the Court says:

"The appeal made by the complainant to the Department was really nothing but an appeal to its discretion. Assuming that the Court in some cases has the power to, in effect, review the determination of the Department, we do not think this is an occasion for its exercise. The complainant is really appealing from the discretion of the Department to the discretion of the Court, and the complainant has no clear legal right to obtain the order sought."

In *Lou Wah Suey vs. Backus,* 225 U. S. 460 (56 L. Ed. 1167) which seems to be the latest case in point, the Court, speaking through Mr. Justice Day says:

"A series of decisions in this Court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders

> made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, *or that there was a manifest abuse of the discretion committed to them by the statute.* In other cases the order of the executive officers within the authority of the statute is final. U. S. vs. Ju Toy, 198 U. S. 253, 49 L. Ed. 1040, 225 Sup. Ct. Rep. 644; Chin Yow vs. U. S., 208 U. S.; 8, L. Ed. 369. 28 Sup. Ct. Rep. 201; Tang Tum vs. Edsell, 223 U. S. 673."

It is suggested on pages 32-33 of Counsel's Opening Brief, that appellant's mercantile status during the two and one-half years he was at large *on bond* should be considered as a factor herein. We have heretofore called the Court's attention to the Government's position that no mercantile status within the meaning of the Chinese Exclusion and Restriction Acts can be based upon an unlawful entry; that there is no entry in contemplation of law pending an investigation and until a final order is made by the Court, but in addition to this, the transcript of the the record shows that this two and one-half years referred to and while appellant was so at large on bond, was, at least in part occasioned by the acts and proceedings of appellant in his original petition for Habeas Corpus and his appeal to the Supreme Court of the United States. This latter appeal was dismissed

June 7, 1916, and an order entered requiring the surrender of appellant to the Immigration officers for deportation, and the transcript of the record on page 23 thereof, contains the following: "That although frequent requests were made on the part of the Government to have said detained surrendered, it was not until on or about *May 24, 1917*, that said detained was surrendered to the Government officials." It is at least a remarkable claim, on the part of counsel, to make to the Court that consideration be given as to what appellant was doing during the period of time he, not only delayed a final decision, *but failed to surrender himself to the Government officers for almost a year after the final decision and order of the Supreme Court.*

When the decision on his first writ of Habeas Corpus had become final and he was finally surrendered to the Government officials for deportation, he again applied for a writ of Habeas Corpus, to-wit, the proceeding now before this Court, and this Court is now confronted with the suggestion that this two and one-half years of litigation during which time it is said by counsel that appellant was a merchant, "is certainly evidence of a most convincing character that his mercantile occupation is an honest and sincere one and entitled to recognition by the Governmental authorities of the United States."

The cases cited by petitioner's counsel, page 25 of Opening Brief, "illustrative of the point that a legal domicile and exempt status will be recognized in the absence of evidence showing a legal entry" are not in point at all, but are to be differentiated from the case at bar in this: That in the cases cited wherein Chinese are involved, the Chinese were all residents of the United States before the Registration Acts of May 5, 1892, and Nov. 3, 1893, were passed and had either registered under said Acts or were merchants during the period of registration and therefore not required to register, as Chinese laborers only were required to register at that time. Chin Fong did not enter the United States until several years after the registration period, according to his own testimony not until 1897 or 1906, and therefore could have no certificate of residence. The other cases cited arose under the general Immigration Laws and are not at all applicable to the case now under consideration.

We have no fault to find with counsel's quoting the Wong Wing case. The language of the Cardinal quoted by the late and distinguished Judge Field expresses a sentiment that meets not only the approval but the admiration of all and no doubt was properly applied to the facts in the case then before that Court, and to which they were directed, but in

what particular it is applicable to any phase of the case at bar is not pointed out by counsel, and without which it is not made clear.

Chin Fong has had a hearing in every department of the Immigration Service; he has had his case heard twice in the District Court; once in the United States Supreme Court and is now in the Circuit Court of the United States, and thus will have had his case heard in all the United States Courts thus far established or authorized by the Constitution of the United States, and the Supreme Court of the United States has determined that there is no constiutional question involved, nor has applicant been denied any constitutional right. His effort is directed solely to securing from the Courts a decision that a Chinese who has been engaged in a mercantile business in the United States for one year or more has acquired a lawful mercantile status, irrespective of an unlawful entry and to limit the investigation to the time he was thus engaged.

Respectfully submitted,

ANNETTE ABBOTT ADAMS,
United States Attorney,

BEN F. GEIS,
Asst. United States Attorney,
Attorneys for Appellee.